In The

Supreme Court of the United States

October Term 1976

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the New York Court of Appeals was rendered on April 1, 1976. *People v. Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976). The opinion appears in the Appendix filed with this Brief starting at page A. 96. No other opinions were rendered by the lower courts.

JURISDICTION

The judgment of the New York Court of Appeals was filed and entered April 1, 1976 (Appendix B-1 to Jurisdictional Statement). A Notice of Appeal to this Court was filed on May 26, 1976 in the Steuben County Court, the Court possessed of the record (Appendix C to Jurisdictional Statement). The Jurisdictional Statement was filed on June 24, 1976; probable jurisdiction was noted by this Court on October 4, 1976.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(2) (1970).

STATUTES INVOLVED

United States Constitution, Amendment XIV

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

In pertinent part, the New York Penal Law states:

N.Y. Penal Law §125.25 (McKinney 1975) Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

*In 1974, the Legislature added a new crime, murder in the first degree. N.Y. Penal Law, §125.27 (McKinney 1975). This statute comes into operation where the victim of the murder is a police officer, an officer in a correctional facility or where the defendant was incarcerated for a life sentence. A convicted defendant is to be sentenced to death. N.Y. Penal Law, §60.06 (McKinney 1975). As part of this enactment, section 125.25, which formerly defined the degreeless crime of murder, was retitled, without a change in substance, murder in the second degree. (L. 1974, ch 367, §4.)

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime;

* * *

Murder in the second degree is a class A-I felony.

N.Y. Penal Law §125.20 (McKinney 1975) Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

* * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

* * *

Manslaughter in the first degree is a class B felony.

N.Y. Penal Law §25.00 (McKinney 1975). Defenses; burden of proof

* * *

2. When a defense declared by statute to be an "affirmative defense" is raised at trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

QUESTION PRESENTED

Whether the statutory provisions of the New York Penal Law, which placed the burden on Appellant at his trial for murder to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, on their face and as applied to Appellant, violate the Appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In Re Winship*, 397 U.S. 358 (1970).

STATEMENT OF THE CASE

This appeal arises from Appellant's conviction for murder. The uncontroverted facts are as follows:

Appellant, Gordon Patterson, and his wife, Roberta Rooks, had a highly unstable courtship and subsequent marital relationship, marked by recurring verbal arguments and physical assaults (R.* 561-64), highlighted by five break-ups during the engagement and four more break-ups during the marriage (A.** 55).

Roberta Rooks was six months pregnant when she married Appellant. Although neither Appellant nor the decedent, John

*R refers to pages in the transcript of the original Record on Appeal.

**A refers to Pages in the separately bound Appendix filed with the Brief in this Court.

Northrup, was the father (A. 55), the child was given the surname - Patterson (A. 55; R. 560, 892). After seven months of marriage, Appellant's wife left him permanently on August 5, 1970. She later commenced divorce proceedings against Appellant (A. 55; R. 574-82).

After her separation from Appellant, Roberta resumed dating the decedent, John Northrup, a neighbor to whom she had been engaged prior to her marriage to Appellant (R. 442, 584). Between the final breakup in August, 1970 until the fatal shooting of John Northrup by the Appellant on December 27, 1970, the Appellant made strenuous efforts, mostly through a litany of telephone calls, sometimes ten each night, to Roberta and her relatives, to try to reunite with Roberta. Roberta talked with him on some occasions and other times hung up (A. 56). These efforts and calls reached a crescendo on the evening of December 26, 1970 and early morning of December 27, 1970. (A. 55, 58, 60; R. 321, 470, 471, 474, 475, 806, 807, 808).

On December 10, 1970, the Appellant went to his in-laws' residence and found his wife in a compromising situation with John Northrup and struck him (R. 589, 590, 598). On December 15, 1970, Appellant called the Veteran's Administration in Bath, New York to request a neuropsychiatric examination (A. 59; R. 861, 864). On Christmas Eve, Appellant's wife and the child met at Appellant's mother's home where Appellant gave Roberta many gifts, including a ring and a yellow skirt. Roberta gave Appellant a watch (R. 469, 480).

On December 27, 1970 the Appellant attended a church service at which the subject of the sermon was adultery and which contained the following thought:

> "You can only pent up true feelings just so long, then you have to burst, something has to break." (R. 828)

Later that day, Appellant drove to the home of a friend, Murray Collins, to ask advice on the mechanical condition of his

car. After a discussion with Collins, he made arrangements to have his car repaired the next day. Collins agreed to lend Appellant a car for his use while repairs were being made. Appellant also asked Collins to lend him a .22 caliber rifle which was lying on a table. Appellant claimed he wanted to use the rifle for target practice (R. 361-62, 365-67). Collins testified he volunteered to furnish an undetermined amount of ammunition which Appellant had not requested. Collins stated he did not consider the request for the loan of the rifle to be an unusual one since Appellant had borrowed guns from him on previous occasions (R. 389-391).

Appellant, taking the borrowed rifle, drove by his father-in-law's residence and saw John Northrup's car there. He parked the auto he was driving, and with the rifle in hand, went to the Rook's house. He looked in through a door and window and saw John Northrup, the baby and his wife Roberta. Roberta was dressed in only a blouse and slip and was trying on the yellow skirt Appellant gave her only two nights before (R. 480). Thereupon he entered the house and shot Northrup twice in the head, killing him. (A. 60; R. 480, 510).

Appellant called as a witness, Dr. William Libertson, a psychiatrist, who when presented with a hypothetical question which summarized the facts, stated his opinion that Appellant at the time of the shooting was under the influence of extreme emotional disturbance, his perceptions were warped, his acts irrational and his ability to control himself defective (A. 24, 25).

At the request of the prosecution, Appellant was examined before the trial by another psychiatrist, Dr. Martin Lubin of New York City. The District Attorney, however, did not call Dr. Lubin to testify and he conceded that Dr. Lubin's testimony would have supported the conclusions of Appellant's psychiatric witness, Dr. Libertson (A. 62; R. 1129).

The facts of the marital relationship between Appellant and Roberta and the physical facts of the killing were not in disupte at the trial. As the trial court stated in its charge to the jury:

> "What actually happened here is clear, although there are some minor discrepancies between the stories told from the witness stand." (A. 73); *see also, People v. Patterson*, 39 N.Y.2d 288, 291-92, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976); (A. 96, 97).

At the trial, Appellant raised the affirmative defense that at the time of the alleged crime he was "acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. . . ." According to the New York statutory scheme, Appellant had the burden to prove this defense by a preponderance of the evidence in order to reduce murder to manslaughter. N.Y. Penal Law §§25.00; 125.20; 125.25 (1) (a) (McKinney 1975). The jury was charged in conformity with these statutes.

In part the judge stated to the jury:

> This is what we call, and what the law has designated as, an affirmative defense. That means that if you believe that the defendant acted under extreme emotional disturbance, and that there was reasonable explanation for its existence at that time and place and under those circumstances, you cannot find him guilty of murder. You may, of course, on further examination of the evidence, decide that there was manslaughter in the first degree, as I shall instruct you, but you cannot find murder if, indeed, you believe this. (A. 74)
>
> * * *
>
> In this connection, there is one other consideration. I have already instructed you that, generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the

burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence. (A. 74, 75)

* * *

As to the preponderance of the evidence it is the quality of the testimony and not its quantity which guides you in your deliberations. By a preponderance of the evidence we do not mean the greater number of witnesses, we mean the greater weight of the believable (credible) testimony and evidence which has been brought here during the course of this trial as to the defense of extreme emotional disturbance.

You might consider in determining this, if you will, an imaginary scale, and after you have sifted out the evidence, place the believable and credible evidence in favor of the defendant as to the issue of this defense of extreme emotional disturbance on the one side of the scale and the believable and credible evidence in favor of the prosecution on that particular issue on the other side of the scale. And if in your judgment and your judgment alone, the scale tips in favor of the defendant, then he has sustained his burden of proof as to the defense of extreme emotional disturbance. On the other hand, if the scale is evenly balanced, then the defendant has failed to establish his burden of proof as to that particular fact. (A. 76)

The charge of the court is set forth in its entirety in the Appendix. (A. 46-95; see especially A. 73-80). The jury deliberations took roughly fifteen hours over a period of two days (A. 82, 85, 86, 87). The jury made four requests for clarification of the charge. These requests were for a reading of

the portion of the charge pertaining to the definitions of the two crimes charged — Murder and Manslaughter, in the First Degree (A. 83-84); a second reading of those same portions of the charge (A. 92); a copy of the defendants' psychiatrist's report (A. 83); and a copy of the defendant's testimony (A. 86-88).

The jury returned a verdict of guilty of murder and a judgment of conviction for murder was entered in the Steuben County Court on July 6, 1971. Defendant was sentenced to a term of 20 years to life imprisonment. The Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the conviction without opinion, by a judgment and order dated, May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dep't 1973).

On April 1, 1976, the Court of Appeals, by a 4-3 vote, affirmed Appellant's conviction for murder and upheld the constitutionality of the New York Penal Law provisions which required Appellant to prove that he was acting under the influence of extreme emotional disturbance in order to reduce murder to manslaughter. The majority opinion held that "the law of this State does not infringe the due process interests that *Mullaney* sought to protect" (A. 104). The New York Court of Appeals concluded that *Mullaney* is not applicable because, unlike Maine, the New York affirmative defense in question "does not negate intent" which "the prosecution is at all times required to prove . . ." (A. 111). The New York Court concluded further that *Mullaney* was distinguishable on the grounds that "the opportunity opened for mitigation differs significantly from the traditional heat of passion defense" (A. 111). Yet, noting that the three dissenters formed a contrary interpretation of *Mullaney*, the Court stated: "To be sure, the issue is not free from doubt" (A. 112).

Even greater doubt was expressed by one of the 4-3 majority, Judge Jones, who in a separate concurring opinion stated:

> "Thus, I am not prepared ... to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, would appear to call for that result. Another reading of the same opinion leads *others* to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to the Court the articulation of its views ..." (Emphasis added). (A. 117)

The separate concurring opinion of Chief Judge Charles Breitel, favorably referred to in the majority opinion (A. 113), reveals a basic disagreement with this Court's decision in *Mullaney*. He states:

> "The placing of the burden of proof on the defense with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the "element" of mitigating circumstances is generally unfair." (A. 115)

Chief Judge Breitel further argued that requiring the prosecution to bear the burden of proof on ameliorative defenses might discourage their use.

The three dissenters would have voted to reverse Defendant's conviction on the basis that *Mullaney* was "determinative" of his due process claim (A. 121).

Significantly, the majority opinion specifically found that "the People did not controvert the testimony of the defense psychiatrist ..." (A. 113).

SUMMARY OF ARGUMENT

Appellant challenges his murder conviction on the grounds that the requirement of the New York Penal Law that he must bear the burden of persuasion by a preponderance of the evidence of the affirmative defense to murder, that he was acting

under the influence of extreme emotional disturbance in order to reduce murder to manslaughter is in direct conflict with this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

Appellant's overall contention is that there is a total functional identity between the extreme emotional disturbance defense of New York and its common law forebear, the heat of passion defense reviewed in *Mullaney*. Both defenses mitigate the crime rather than exonerate the defendant. Both defenses have specific reference only to the laws of homicide. Both distinguish murder from manslaughter. Both operate on the same premise that intentional killing resulting from loss of control is less culpable than killing in cold blood. Both place the burden of persuasion on the defendant and require the same quantum of proof by the defendant (i.e. preponderance of the evidence).

Moreover, the three *Winship* factors analyzed by this Court as critical in *Mullaney* are clearly present in the challenged New York affirmative defense. The first factor, community confidence in reliability of verdicts is even more crucial now because under recent cases decided by this Court, murder is a crime for which the death penalty can be imposed. As for the second *Winship* factor, the New York Court of Appeals decision below conceded that the punishment differentials between murder and manslaughter are significant. Third, the stigma attached to murder as opposed to manslaughter can be no less in New York than in Maine or any other state.

The *Patterson* majority argued that New York law is distinguishable since in Maine* a defendant had to negative the element of intent. Appellant responds that this is a misreading of *Mullaney* and clearly not the law in Maine. The presumption of

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*Reference to Maine law is at the time of the *Mullaney* decision. Maine has now adopted the extreme emotional disturbance defense and the persuasion burden is on the prosecution. Maine Rev. Stat. 17-A, §204 (Supp. 1976).

"malice aforethought" in Maine was a policy presumption only, not a fact to be proved and was thus only a way of expressing the absence of heat of passion. Therefore, Appellant contends that the application of *Mullaney* should not turn on the fact that Maine had a phrase — "malice aforethought" — to describe the absence of heat of passion, while New York has no particular name to describe the absence of extreme emotional disturbance. In both states an intentional and unjustified killing is proof of murder, without more. In both states, proof of the mitigation defense reduces murder to manslaughter. In substance (if not in form) both affirmative defenses function identically.

The *Patterson* majority singled out the fact that the extreme emotional disturbance defense is more liberal than its forebear, the heat of passion defense, but the majority opinion does not develop what relevance this has in terms of *Winship* and *Mullaney*. In a separate concurring opinion, Chief Judge Breitel articulated reasons why affirmative defenses should not, as a general matter, be restricted in their formulation and application by judicial limitations.

Chief Judge Breitel noted that affirmative defenses serve a laudable purpose in the criminal law. If the burden of persuasion must remain on the prosecution with affirmative defenses, Chief Judge Breitel argued that there may be legislative retaliation eliminating such defenses altogether. Appellant responds that a laudable purpose per se, does not justify shifting the burden. *Winship, supra*. Also, the purpose of avoiding legislative retaliation affords no recognized basis in law for not applying constitutional due process standards. With regard to the potential for legislative retaliation, Appellant points out that most states that have adopted the extreme emotional disturbance defense do not shift the burden to a defendant. Furthermore, New York bases its extreme emotional disturbance defense on the ALI Model Penal Code formulation and that Code specifically does not make extreme emotional disturbance an affirmative defense.

An implicit corollary to the above argument is that since a state can eliminate a defense altogether, it should certainly be allowed to shift the burden. This rule is sometimes referred to as "the greater includes the lesser" rule and Appellant contends this rule has been severely limited by this Court in *Tot v. United States*, 319 U.S. 463 (1943) and *Leary v. United States*, 395 U.S. 6 (1969). To paraphrase what this Court stated in *Mullaney:* if a state chooses to make a defense the distinguishing factor between murder and manslaughter it bears the burden of proving it. *Mullaney v. Wilbur, supra*, at 697, 698.

Chief Judge Breitel also advanced the "hardship of proof" argument that mitigating circumstances are within the defendant's knowledge, it is fair for him to prove them and unfair to require the prosecution to prove them. This "hardship of proof" argument was rejected in *Mullaney*. Furthermore, in New York, the prosecution has the burden of persuasion on both self-defense and more significantly, insanity. Thus, "hardship of proof" is not a consistent argument for New York to make. Appellant also demonstrates from the comments of the Model Penal Code, the legislative history of the emotional disturbance defense in New York and the plain meaning of the defense itself, that the extreme emotional disturbance defense is based ultimately upon an objective standard, (i.e. there must be a reasonable explanation or excuse) even though the sufficiency of the defense is judged from the viewpoint of a person in the defendant's situation. Finally as to hardship of proof, Appellant contends that nothing prevents a state from utilizing a "notice of defense" requirement or a pre-trial psychiatric examination of a defendant where the defendant intends to utilize a psychiatrist at trial.

Appellant also demonstrates that shifting the burden of proof to the defendant had crucial significance in this case in view of the fact that the prosecution psychiatrist agreed with the defense psychiatrist that Appellant was acting under the influence of

extreme emotional disturbance at the time of the killing. The jury's questions to the Court during their deliberations indicated their concern over the issue of the extreme emotional disturbance defense.

The Appellant in Point II distinguishes the insanity defense because of Appellee's contention in his Motion to Dismiss that *Patterson* is consistent with cases which uphold placing the burden of proving insanity on a defendant.

It must be stressed that the *Patterson* majority did not base any part of their decision on a claim that extreme emotional disturbance should be treated constitutionally in the same manner as the insanity defense. These defenses are legally distinct and in New York the prosecution has the burden on insanity. Second, the analysis of Justice Rehnquist in his concurring opinion in *Mullaney* applies to distinguish the extreme emotional disturbance defense of New York from insanity just as it did with the heat of passion defense of Maine. Unlike insanity, both extreme emotional disturbance and heat of passion do [redacted] bear a necessary relationship to the required mental elements of the crime (i.e. less culpable intent).

A third distinction from insanity is that extreme emotional disturbance is "ultimately objective" while insanity concerns itself with much more subjective and behavioral criteria. This distinction relates to the hardship of proof argument discussed in Point I of the Brief. Extreme emotional disturbance is objective because some tangible event or events must cause a defendant's loss of control to provide the reasonable explanation or excuse for his conduct whereas proof of insanity need show no cause nor explain anything other than the insanity status of the defendant without reference to tangible events or resonable excuses.

Fourth, Appellant demonstrates that this Court looked to state practice on placing the burden of insanity in *Leland v. Oregon*, 343 U.S. 790 (1952). This state practices factor cuts

the other way with extreme emotional disturbance however where New York is in the distinct minority on shifting the burden to the defendant on the defense of extreme emotional disturbance.

Finally, as to insanity, Appellant argues that the insanity defense is bound up with a presumption of sanity and that New York has specifically rejected a presumption analysis for the extreme emotional disturbance defense.

Lastly, Appellant argues that as the Court of Appeals found in *Patterson*, the decision in *Mullaney* should be applied retroactively since it is based on the decision in *Winship* which has been made fully retroactive by this Court.

In summary, this murder conviction should be reversed because the challenged New York statutory scheme is functionally identical to the rule declared unconstitutional by this Court in *Mullaney;* the extreme emotional disturbance defense of New York is historically grounded upon the heat of passion defense; and the analysis of *Winship* by this Court in *Mullaney* applies with equal force to the challenged defense.

POINT I

THE MAJORITY OPINION BELOW, UPHOLDING THE VALIDITY OF THE NEW YORK PENAL LAW REQUIREMENT THAT THE DEFENDANT IN A MURDER PROSECUTION MUST BEAR THE BURDEN OF PROVING THE AFFIRMATIVE DEFENSE THAT HE WAS "ACTING UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE" IN ORDER TO REDUCE MURDER TO MANSLAUGHTER, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *MULLANEY V. WILBUR* AND *IN RE WINSHIP*.

A. INTRODUCTION

1. *The New York Affirmative Defense Is Functionally Identical To The Defense Declared Unconstitutional in* Mullaney.

This Court has explicitly established that the Due Process Clause of the Fourteenth Amendment to the United States Constitution mandates the use of the reasonable doubt standard in criminal cases. *In re Winship*, 397 U.S. 358 (1970). It is further established that *Winship* requires the prosecution in a murder trial to bear the burden of persuasion beyond a reasonable doubt on proof of a fact which would reduce murder to manslaughter, even though such a "critical fact in dispute" is not considered by a state to be an element of the crime of murder. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). In *Mullaney*, this Court unanimously declared unconstitutional a State's requirement that a defendant in a murder trial bear the burden of proving by a preponderance of the evidence that the killing was done in the "heat of passion" in order to reduce murder to manslaughter.

The New York statutory scheme challenged here required the Appellant in his murder trial to bear the burden of proving by a preponderance of the evidence that he was "acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" in order to reduce murder to manslaughter. On their face, the defense invalidated in *Mullaney* and the challenged New York defense are functionally identical. As in Maine,[1] the New York defense has particular reference only to homicide. As in Maine, the New York defense is one of mitigation, reducing murder to manslaughter rather than providing for total exoneration. As in Maine, the New York defense requires the defendant to bear the burden of persuasion by a preponderance of the evidence. This identity is not accidental as the extreme emotional disturbance defense is grounded upon the heat of passion defense. See Appendix B to this Brief.

2. *The Analysis of* Winship *By This Court In* Mullaney *Applies with Equal Force To The New York Affirmative Defense.*

When the New York affirmative defense of extreme emotional disturbance is subjected to the analysis of *Winship* engaged in by this Court in *Mullaney*, the result is identical. This Court looked to three factors cited in *Winship* for determining whether the reasonable doubt standard should apply in *Mullaney*, namely: (1) societal interest in the reliability of verdicts in criminal cases; (2) the significant punishment differentials between murder and manslaughter; and (3) the stigma attached to murder as opposed to manslaughter.

The intervening death penalty cases decided in this Court have highlighted the need for reliability in murder convictions and other heinous crimes. Since murder is one of the limited class of crimes to which many States, including New York have

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[1] All references to Maine law are to the homicide laws as they existed at the time *Mullaney* was decided. Maine has since adopted the "extreme emotional disturbance" defense, but the burden of persuasion is now on the prosecution. Maine Rev. Stat., 17-A, §204 (Supp. 1976).

made the death penalty applicable, it is a matter of supreme importance that a defendant guilty only of manslaughter not be convicted of murder and, thereby, be "eligible" for the death penalty.[2]

It is significant that extreme emotional disturbance is an affirmative defense in New York's death penalty statute, N.Y. Penal Law §125.72(2)(a) (McKinney 1975). Even without regard to the "eligibility" for death penalty consideration, there is no difference between New York and the rule invalidated in *Mullaney* insofar as reliability of verdicts is concerned.

As to punishment differentials between murder and manslaughter, New York has conceded that "the sentences that might be imposed for these crimes differ significantly." *People v. Patterson*, 39 N.Y.2d 288, 301, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *citing* New York Penal Law, §70.00[3] (A. 110).

With respect to the third factor, the stigma can be no different in New York than in Maine. *Mullaney v. Wilbur*, *supra* at 700.

Thus, not only are the relevant New York and Maine homicide laws functionally identical, but also, they have an

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[2]New York Penal Law §125.27; *Gregg v. Georgia*, 428 U.S. , 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. , 96 S.Ct. 2950 (1976); *Proffitt v. Florida*, 428 U.S. , 96 S.Ct. 2960 (1976); *Woodson v. North Carolina*, 428 U.S. , 96 S.Ct. 2978 (1976); *Roberts v. Louisiana*, 428 U.S. , 96 S.Ct. 3001 (1976). It should be noted that in the penalty phase, mitigating circumstances (including provocation) must be taken into account, but are not to be weighed against factors of aggravation and thus are not necessarily controlling. See especially, *Jurek v. Texas*, *supra* at 2965, n. 7. where this Court recognized a distinction between proving provocation as a defense and having it considered in mitigation.

[3]The sentencing range for manslaughter in the first degree is from a minimum of one year to eight and one-third years to a maximum of three to twenty-five years. The sentencing range for murder in the second degree is from a minimum of fifteen to twenty-five years to a maximum of life imprisonment. N.Y. Penal Law §§125.25, 125.20, 70.00 (McKinney 1975).

analytical identity with the *Winship* factors considered controlling by this Court in *Mullaney*.

3. *The Majority Of States Do Not Shift The Persuasion Burden To The Defendant To Prove Facts Which Reduce Murder To Manslaughter.*

Concerning the heat of passion defense, this Court stated in *Mullaney*, "... the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact." 421 U.S. at 696. This trend has been continued in those states which have adopted the extreme emotional disturbance defense. Most of these States place the burden of persuasion upon the prosecution to prove this defense. See Appendix A to this Brief. This modern trend has significant bearing on what the due process standards may encompass. *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970); *In re Winship*, 397 U.S. 358, 361-62 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975).

Thus, the real issue on this appeal is whether there is anything qualitatively different about the challenged provisions of the New York Penal Law to take them out of the ambit of *Winship* and *Mullaney*. Appellant contends that none of the arguments put forth in the majority and concurring opinions below justify not applying *Winship* and *Mullaney* to the New York extreme emotional disturbance defense. Appellant further contends that if for due process purposes, a relevant distinction is made between extreme emotional disturbance and heat of passion, which are so closely related, the efficacy of *Mullaney* will be eroded.

B. THE OPINION BELOW

The basis for the decision of the 4-3 majority of the New York Court of Appeals was that the challenged New York law of homicide differed significantly from the Maine law of homicide declared unconstitutional by this Court in *Mullaney.*[4] The majority viewpoint breaks down into two parts. One part deals with the fact that the New York defense is more liberal to the defendant than the Maine Law.

According to the majority view, another reason the New York law differed from the Maine statute under review in *Mullaney* was that the challenged New York defense did not require a defendant to negative an element of the offense as defined by state law. The Court reasoned that because the New York statute required the prosecution to prove intent and extreme emotional disturbance does not negate but only explains or justifies that element of the crime, the burden of persuasion could fairly be placed on a defendant.

1. *A Formal "Elements Test" Was Rejected By This Court In* Mullaney, *Insofar As Mitigation Defenses To Murder Are Concerned.*

This Court in *Mullaney* specifically confronted and rejected the argument that Maine could place the persuasion burden on the defendant because heat of passion was not an element of the generic crime of homicide. In fact, the reason *Mullaney* was twice granted certiorari was to insure that the lower federal courts accepted the State's (i.e. Maine's) interpretation of its own law. *Mullaney, supra,* at 689. On reviewing *Mullaney* a second time, this Court clearly stated that Maine shifted the

[4]The three dissenting judges sharply challenged their conclusions (39 N.Y.2d at 307 *et seq,* A.117-127), and Judge Jones in his concurring opinion considered this issue to be tantamount to a toss-up (*Id.* at 307, A.117). Even the majority conceded that the issue was "not free from doubt" (*Id.* at 303, A.112).

burden to a defendant in a murder prosecution to prove heat of passion only after the State proved all the elements of murder including intent. *Mullaney, supra,* 691; *see State v. Rollins,* (ME.), 295 A.2d 914, 918 (1972).

The *Patterson* majority, however, placed great stress on the policy presumption in Maine law that malice aforethought was presumed from an intentional killing and that this "element" was what a defendant was required to negative by proof of heat of passion. *Patterson, supra,* 302; (A. 110-111).

The *Patterson* majority stated, 39 N.Y.2d at 302:

> "Under Maine law, malice and heat of passion are reflective of the defendant's intent, and the State could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion. (421 U.S., at 702)." *Patterson, supra,* 302; (A. 111).[5]

The *Patterson* majority view on malice aforethought accords with the view of the initial Federal District Court's opinion described in *Mullaney:*

> ". . . *Winship* requires the prosecution to prove malice aforethought beyond a reasonable doubt; it cannot rely on a presumption of implied malice, which requires the Defendant to prove that he acted in the heat of passion on sudden provocation." *Mullaney v. Wilbur, supra* at 688.

This Court, in *Mullaney* however, rejected the District Court analysis and made clear that its decision did not turn on treating

[5]Significantly, the *Patterson* majority cited *Mullaney,* 421 U.S. at 702, to bolster this view. At this point in the *Mullaney* opinion this Court was discussing problems of proof stating that ". . . proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent: . . ." This portion of the *Mullaney* opinion, was not discussing the role of malice aforethought in Maine.

malice aforethought as an element of the crime of murder in Maine.

> "We reject at the outset Respondent's [e.g. Defendant's] position that we follow the analysis of the District Court and the initial opinion of the First Circuit, both of which held that murder and manslaughter are distinct crimes in Maine, and that malice aforethought is a fact essential to the former and absent in the latter." *Mullaney v. Wilbur, supra* at 690.[6]

Clearly, the Maine law accepted by this Court treated malice aforethought as a policy presumption, connoting no substantive fact required to be proved. *Mullaney v. Wilbur, supra* at 689 n.9. *See State v. Lafferty* (Me.), 309 A.2d 647, 664 (1973) stating ". . . malice aforethought is not, and never has been a fact or probative of other facts"; LaFave and Scott, Handbook on Criminal Law, 539 n.36 (1972). Maine's highest court described malice aforethought in Maine as "linguistically designated" and "a summarizing characterization of the proposition that the intentional killing of one human being by another must bear the heaviest penalty unless extenuated by other circumstances deemed by a wise public policy relevant to the severity of the penalty". *State v. Rollins,* (Me.), 295 A.2d 914, 919, 920 (1972). In sum, the malice aforethought of Maine is a vestigial organ insofar as burden of proof is concerned. *Mullaney v. Wilbur, supra* at 693, n.15.

There is thus no substantive difference between the statutory requirement of proof in New York and Maine at the time of *Mullaney.* Both states require proof of an intentional killing — without more — for murder. The mitigation defenses in Maine,

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[6]*See* Perkins, A Re-examination of Malice Aforethought 43 Yale L.J. 537, 548 (1934). Perkins describes the term "malice aforethought" as "accidental and confusing." He states that historically the phrase simply referred to an intentional killing without justification, excuse or mitigation.

New York, (and indeed most other states and in England)[7] have an identical function in that they reduce murder to manslaughter. These defenses are based on the same principle, namely that intentional murder committed under sufficient loss of control is less culpable than murder committed without such loss of control.

This Court in *Mullaney* rejected an "elements test" for determining the application of the rule of *Winship.*[8] Rather than looking to what a State formally defines as an element of a crime, this Court stated it would look beyond such form in determining which facts in a criminal case the State must prove beyond a reasonable doubt. This Court emphasized it would concern itself with ". . . substance rather than this kind of formalism." 421 U.S. at 699[9]

Despite this clear rejection of an "elements" test for *Winship* purposes, the New York Court of Appeals, nevertheless, applied an elements test to take New York out of the ambit of *Mullaney.*

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[7]*See Mullaney v. Wilbur, supra* at 696.

[8]The so-called "elements test" can be stated thus: in criminal cases a State is only constitutionally required to prove beyond a reasonable doubt those facts that the State characterizes as elements of a particular crime.

[9]Because of this, some commentators view *Mullaney* as having potentially broad application. Allen, *Mullaney v. Wilbur,* The Supreme Court and The Limits of Legitimate Intervention 55 Tex. L. Rev. (No. 2 1977) (copies of page proofs are being prepared by the author for transmittal to this Court); see also, Comment, Unburdening The Criminal Defendant: *Mullaney v. Wilbur* And The Reasonable Doubt Standard, 11 Harv. C.R.—C.L. L. Rev. 390 (1976); Note, Affirmative Defenses And Due Process: The Constitutionality Of Placing A Burden Of Persuasion On A Criminal Defendant, 64 Geo. L.J. 871 (1976).

Another commentator has taken the view that *Mullaney* may only be applicable to murder cases because the rationale of *Mullaney* is to mandate a *mens rea* requirement in murder cases. Tushnet, Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of *Mullaney v. Wilbur,* 55 B.U.L. Rev. 775 (1975).

As has been stated, the *Patterson* majority interpreted Maine law as imposing a burden on the defendant in a murder case to negative malice aforethought, an element of the crime of murder in Maine, in contrast to New York which merely requires the prosecution to prove intent beyond a reasonable doubt. Yet, as a matter of logic and plain reading of the New York homicide statutes, the definition of murder in New York necessarily includes the absence of extreme emotional disturbance. As the *Patterson* dissenters stated:

> "Thus, nothing turns on the fact that Maine gives this absence of the emotional factor a name and New York does not." 39 N.Y.2d at 313, (A. 121).

Further, it is difficult to explain why a mitigating factor such as heat of passion or extreme emotional disturbance reduces murder to manslaughter without stating what facet of murder is lacking when a mitigation is proved. In *Patterson* the trial judge instructed the jury as follows:

> "The point of such proof is to convince you . . . that the defendant's apparent intention to cause death . . . was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." (A. 72, 73).

Another New York Court described it this way:

> ". . . an examination of the record in its entirety reveals an abundance of evidence which would support a finding that the defendant acted without premeditation and deliberateness, and not in extreme emotional disturbance . . ." *People v. Solari*, 43 App. Div.2d 610, 612, 349 N.Y.S.2d 31, 35 (3d Dep't. 1973), *aff'd without opinion*, 35 N.Y.2d 876, 323 N.E.2d 191, 363 N.Y.S.2d 953 (1974).

In a frequently cited case, *People v. Caruso*, 246 N.Y. 437, 446, 159 N.E. 390 (1927), the New York Court of Appeals held

that the then necessary element for first degree murder of premeditation, was not proved where there was shown "sudden and uncontrollable emotion", "hot blood", or "immediate provocation".[10] Thus, while under the Revised Penal Law New York has supposedly "discarded" the concepts of premeditation and deliberation *People v. Patterson, supra* at 299, A. 107, it has retained its mirror-opposite, heat of passion, albeit in the "recast" form of extreme emotional disturbance. *Id.* at 307, (A. 117) (Jones, J. concurring).

Finally, reduction from murder to manslaughter due to mitigating factors has had a long history in the common law during which ~~that~~ mitigation has become inextricably linked to the concept of blameworthiness.[11] See the trial judge's charge to the jury in *Patterson* (A. 79).

Thus, while intent to kill is generally an element of both murder and manslaughter, society has historically deemed

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[10] The *Caruso* case is also instructive on another point. It shows that under prior New York case law, heat of passion was a significant element distinguishing murder in the first degree from murder in the second degree. Thus, the implication in the *Patterson* majority opinion that under prior New York law heat of passion was only relevant to involuntary manslaughter (i.e. no homicidal intent) is seemingly true only on the face of the prior statutes, but not true when the controlling judicial decisions are considered. *People v. Patterson, supra* at 300, (A. 108-109); *see also, People v. Moran*, 249 N.Y. 179, 180, 163 N.E. 553 (1928).

[11] A significant factor in the history of the distinction between murder and manslaughter was the definition of certain killings without malice as being eligible for the benefit of clergy. These killings became manslaughter and the distinction remained even after ecclesiastical jurisdiction was eliminated for secular offenses. See *Mullaney v. Wilbur, supra* at 692-96. *Tushnet*, suggests that *Mullaney* mandates the states to continue this historical distinction in their homicide laws. *Tushnet, supra.* Such a historical basis for the *Mullaney* decision would mean that *Mullaney* is not necessarily applicable to such affirmative defenses as entrapment and the felony-murder defense.

killing done under loss of control as a less culpable form of intent than a killing done in cold blood.[12]

At least in this situation where there is such a unique historical relationship between the mitigation defense and the murder-manslaughter dichotomy, it is important that the "elements test" be rejected; otherwise punishment would be meted out on the basis of formal definitional elements of a crime which in effect become a "tautology", separated from any independent moral basis to justify condemnation and punishment for murder instead of manslaughter. *See* Fletcher, *supra* n.12 at 911. The interests sought to be protected in *Winship* (namely, reliability of verdicts, the significant punishment differential and the stigma attached to the crime) are clearly at stake when a defendant must prove facts which would reduce murder to manslaughter regardless of whether as a formal matter these facts when proved negative an element of the crime as defined by the State.[13]

It thereby follows that the mere classification by a State of facts to be proved as "mitigation factors", *People v. Patterson*, *supra* at 302, (A. 110), rather than as elements of the crime does not justify shifting the persuasion burden to the defendant in a murder trial. *Mullaney v. Wilbur*, *supra* at 698-701.

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[12] *See* Fletcher, Two Kinds of Legal Rules: A Comparative Study of Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968); Wechsler, Codification of the Criminal Law in the United States; The Model Penal Code, 68 Colum. L. Rev. 1425, 1446 (1968); Hart, Punishment and Responsibility (1969) at 14-17; Royal Commission on Capital Punishment, Report, CMD No. 8932 (1953), *quoted in*, Prevezer, The English Homicide Act, 57 Colum. L. Rev. 624, 629-30 (1957). The Commission stated the defect of the crime of murder is that "... it provides a single punishment for a crime widely varying in culpability." Report, *supra* at ¶ 790. *See Prevezer, supra; see also, Morrissette v. United States*, 342 U.S. 246, 250 (1952).

[13] Appellant does not argue that he has no burden of production, *Mullaney v. Wilbur*, *supra* at 701 n.28. It is clear in this case that the defense was properly raised. *People v. Patterson*, *supra* at 304, (A. 113).

A corollary of the above discussion is that nothing turns, *per se*, on whether a State follows the rule of *Commonwealth v. York*, 50 Mass. (9 Met.) 93 (1845). The *Patterson* majority stressed that New York did not follow the *York* case in that New York does not imply malice from the mere fact of intentional killing. *People v. Patterson*, *supra* at 299, (A. 117).[14] Yet it was the effect of the York rule in shifting the persuasion burden of mitigation to the defendant, and not the precise verbal formulation of the *York* rule that was deemed relevant by this Court in *Mullaney*. *Mullaney v. Wilbur*, *supra* at 694-696.

Thus, the fact that New York does not follow the *York* rule does not support the result reached in *Patterson*.

2. *The Liberal Scope of The Extreme Emotional Disturbance Defense Does Not Justify Shifting the Burden.*

The other major factor that the *Patterson* majority cited as a reason for not applying *Mullaney* to the New York affirmative defense of extreme emotional disturbance is that it is more liberal than the common-law heat of passion defense.[15] 39

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[14] The case cited by the *Patterson* majority was *Stokes v. People*, 53 N.Y. 164 (1873) 39 N.Y.2d at 299. *Stokes* held that mere proof of killing does not imply premeditation. New York has since "discarded" the concept of premeditation because it was "nebulous." *People v. Patterson*, *supra* at 299, (A. 107); *see also, People v. Caruso, supra.*

[15] The *Patterson* majority referred to two major sources for its description of the extreme emotional disturbance defense: Model Penal Code §201.3 and Comment (Tent. Draft No. 9 1959) and the Notes of the Staff of the State Commission on Revision of the Criminal Law and Penal Code, Gilbert's Criminal Law and Practice of New York (1967). These are set forth in full in Appendix B to this Brief.* These sources establish two crucial points. First, the extreme emotional disturbance defense is firmly grounded in the common-law heat of passion defense. Second, the phrase extreme emotional disturbance attempts to represent a definitional improvement that is more "logical and fair" to the defendant. These two points are related because the logic and fairness arise from attempts to improve the application of the common-law mitigation from murder to manslaughter, and not to create a wholly new defense.

*Also included in this Appendix are relevant excerpts from Hechtman, Practice Commentary to N.Y. Penal Law §125.20 (McKinney 1975).

N.Y.2d at 302, (A. 111). The reason why this liberality should in essence be a *quid pro quo* for shifting the persuasion burden to the defendant is not articulated in the majority opinion, but the concurring opinion of Chief Judge Breitel does articulate certain arguments relative to the liberality of affirmative defenses generally. 39 N.Y.2d at 305-307, (A. 114-116).

a) *Hardship of Proof does Not Justify Shifting The Persuasion Burden*

Chief Judge Breitel argued that it is unfair to require the prosecution to prove facts peculiarly within the knowledge of the defendant, 39 N.Y.2d at 305-306, (A. 114, 115). This is the more general justification for shifting the burden of persuasion for affirmative defenses. *See*, Hechtman, Practice Commentary to N.Y. Penal Law §25.00 (McKinney 1975) at 62-63; Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955) at 108-114.[16] This was the argument of the State of Maine in *Mullaney* and it was rejected. 421 U.S. at 701-702. The issue thus becomes whether there is anything in the broadened scope of the extreme emotional disturbance defense that mandates a different result.[17]

It is clear that the prosecution has a difficult task to meet the burden of proof in certain areas. The difficulties of proof are evident in an area such as intent which the trial judge in *Patterson* aptly described as a "secret operation of the mind" (A. 71), or, as Mr. Justice Jackson described it — the "elusive mental element". *Morrissette v. United States*, 342 U.S. 246, 248 (1952). Yet difficulty of proof is not a justification for shifting the burden on intent to the defendant. First there are acceptable and easily comprehended methods of proof of inner thought processes. One traditional method is an assessment of a person's conduct and actions and the results which ensue. (See trial Judge's charges in *Patterson*, (A. 69, 70)). In this regard it must be stressed that in determining whether or not a defendant acts under the influence of extreme emotional disturbance, the "ultimate test" is an objective one, even though the concept of extreme emotional disturbance introduces a "larger element of subjectivity" (i.e. reasonable explanation or excuse). Model Penal Code, §201.3, Comment (Tent. Draft No. 9 1959) (at 41). See Appendix B to this Brief.[18] The *Patterson* case is a good example of this objectivity test to assess action and conduct. As the judge charged the jury about the facts ". . . what happened is clear except for minor discrepancies," (A. 73).

Mullaney cites two other factors which are relevant to the validity of the hardship of proof argument. One is that "most States require the prosecutor to prove the absence of passion." 421 U.S. at 701. This consensus is also true of the States adopting the extreme emotional disturbance defense. See Appendix A to this Brief.

The other factor this Court looked to in *Mullaney* was what the State itself required in the way of apportioning the burden of proof on other similar issues and noted that Maine required the prosecution to disprove self-defense. *Mullaney, supra*, at 702.

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[16] Significantly the Model Penal Code does not shift the burden of persuasion to a defendant on its extreme emotional disturbance defense. Model Penal Code §201.3 (Tent. Draft No. 9 1959); Model Penal Code §3.01, Comment (Tent. Draft No. 8 1958) (at 4); Model Penal Code §1.13 (Tent. Draft No. 4 1955) at 108-114.

[17] The convenience of the parties or hardship of proof argument has been criticized as a use of civil procedure which has no place in the criminal law system where the paramount societal interest is in convicting for each specific crime only those who are blameworthy rather than all those who might be blameworthy. Fletcher, *supra* n. 12; *cf. Morrison v. California*, 291 U.S. 82 (1934).

[18] Actually, Maine has characterized heat of passion, per se, as a "subjective condition" which is "in the ultimo" objective because the provocation must be "adequate." *State v. Rollins, supra* at 920. This is a description remarkably similar to the Comments of the Model Penal Code description of extreme emotional disturbance. Model Penal Code §201.3, Comment (Tent. Draft No. 9 1959) (at 41); *see Mullaney, supra* at 702.

With respect to self-defense, this is also true of New York. N.Y. Penal Law §§25.00, 35.00 (McKinney 1975). More significantly, New York traditionally places the ultimate burden of persuasion of disproving insanity on the prosecution. N.Y. Penal Law, §30.05 (McKinney 1975); *People v. Silver*, 33 N.Y.2d 475, 310 N.E.2d 520, 345 N.Y.S.2d 915 (1974); *see also, Davis v. United States*, 160 U.S. 469 (1895).

As a practical matter, as is true of self defense, the extreme emotional disturbance and heat of passion defenses by their nature generally admit the major portion of the prosecution's case. Of necessity, the assertion of such defenses requires an admission from the defendant that he was present at the scene of the crime and that he did, in fact, do the killing. This weakens the force of the hardship argument.

Moreover, this Court made clear in *Mullaney* that the defense must be properly presented and thus a requirement may be imposed on the defendant that he give notice of the defense. *Williams v. Florida*, 399 U.S. 78 (1969); *See* N.Y. Crim. Proc. Law §§250.10 and 250.20 (McKinney 1971) (notice of insanity defense and notice of alibi). Further, where the defense intends to rely on psychiatric testimony, the defendant can be required to submit to pre-trial examination by a prosecution psychiatrist.[19] *Lee v. County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, *cert. denied*, 404 U.S. 823 (1971). *People v. DiPiazza*, 24 N.Y.2d 342, 248 N.E.2d 412, 200 N.Y.S.2d 545 (1969). Thus, nothing hinders the prosecution from a full investigation into the source of the so-called "subjective facts", to wit, the defendant himself.

There are of course, some situations where because of difficulty of proof the burden may be shifted to the defendant. But

[19] In *Patterson*, the prosecution did in fact have its own psychiatrist examine appellant prior to trial, but the expert witness was not called by the prosecution at trial because he would have supported Appellant's case (A.62; R. 1128).

none of these are analogous to the extreme emotional disturbance defense. These cases deal with specific matter which would normally be only in the defendant's possession and which the defendant is required to produce or lose on that issue. *Rossi v. United States*, 289 U.S. 89 (1933) (defendant must produce bond and registration); *United States v. Fleischman*, 339 U.S. 349 (1950) (evidence of good faith in complying with subpoena); *see also, Morrison v. California*, 291 U.S. 82 (1934); *People v. Felder*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643, *aff'g.* 39 App. Div. 2d 373, 339 N.Y.S.2d 992 (2d Dep't (1972), *appeal dismissed sub nom, Felder v. New York*, 414 U.S. 948 (1973) (defendant must prove weapon not loaded or inoperable.) Cases of this kind have been analyzed as situations which bear almost no possibility that an innocent defendant may be convicted for failure of proof on the issue in question and it is this reliability factor which allows the burden to be shifted. Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 180-81 (1969).

The above line of cases and the Ashford and Risinger analysis which justify them do not apply to extreme emotional disturbance any more than to the heat of passion defense for the reasons stated above.

b) ***A Laudable Purpose Does Not Justify Shifting The Burden***

Chief Judge Breitel also makes reference to the "salutary criminological purposes served by the development of affirmative defenses, even where the burden of proof rests on the defendant." *People v. Patterson, supra* at 305, A. 114. By itself, a laudable purpose should not justify shifting the persuasion burden to the defendant. This Court has rejected such an argument where the prosecution had the burden of proof, but by a lesser standard than reasonable doubt. *In re Winship*, 397 U.S. 358, 365-66 (1970); *see also, In re Gault*, 387 U.S. 1, 27,

36 (1967). Since the foregoing cases are set in the context of juvenile proceedings which are saturated with benefical intentions, a laudable purpose argument would have even less force in the context of adult crimes.

The laudable purpose test is, however, coupled with the "political considerations" argument which states that laudable affirmative defenses will not be enacted into law unless legislators can be given a trade-off on the burden issue. *People v. Patterson*, *supra* at 305-306, A. 114-115. There are two things wrong with this argument. First, it is by itself not based on any principle of law.[20] *See* Fletcher, *supra* at 928-29. In a related line of cases this Court has rejected such political arguments. As Justice Marshall has stated:

> A State may not employ an invidious discrimination to sustain the political viability of its programs. As we observed in *Shapiro*, *supra*, at 641, 89 S.Ct., at 1335, "[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also *Cole v. Housing Authority of City of Newport*, 435 F.2d 807, 812-813 (CA 1 1970)." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267 (1974).

Second, this "political considerations" argument is not supported factually. Most of the States adopting the defense of extreme emotional disturbance do not shift the persuasion burden to the defendant. (See Appendix A to this Brief).

Also with regard to the "political considerations argument, the Model Code treatment of entrapment is advanced by Chief Judge Breitel as an example of how a compromise on the burden

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[20] If we assume complete retroactivity on this issue, as the *Patterson* majority did, then this argument, by itself, allows "sacrifice" of appellant and all others convicted of murder since 1967 who raised this defense on the mere possibility that the legislature might deprive future defendants of this defense in murder cases.

issue can yield beneficial results (i.e. the passage of an "ameliorative defense"). *People v. Patterson*, *supra* at 306, A. 116. The point is that the defense of extreme emotional disturbance challenged here was also created by the ALI to ameliorate some of the illogical limitations on the scope of the heat of passion defense. Certainly this was a benefit for a defendant and yet the Model Penal Code clearly did not shift the burden of persuasion to the defendant as the price of the improvement in the law.[21] Beyond this, New York until the passage of the 1967 Revised Penal Code did not require a defendant to carry the burden on any defense including insanity, self-defense, excusability, etc. *See* Hechtman, Practice Commentary to N.Y. Penal Law §25.00 (McKinney 1975) at 62. Significantly, such defenses were judge-made law, but there was no legislative "retaliation" such as is hypothesized in the *Patterson* decision. *See id.* More particularly, the insanity defense was liberalized in 1965 without any *quid pro quo* shift of the burden of proof. *See* Hechtman, Practice Commentary to N.Y. Penal Law §30.05 (McKinney 1975) at 69-70.

A related argument made by Chief Judge Breitel is the suggestion that if a laudable defense which places the burden on the defendant in order to pass the legislature is subsequently declared unconstitutional, the legislative reaction "would be to

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[21] The *Patterson* majority, 39 N.Y.2d at 301, A.109, stated that "the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstances is upon the Defendant." It should be pointed out that the structure of the Model Penal Code is such that the burden shifts to a defendant only when a defense is denominated "affirmative." Extreme emotional disturbance was not denominated as "affirmative defense" by the ALI. *See* Model Penal Code §3.01, Comment (Tent. Draft No. 8 1958) (at 4), where it is also made clear that there was a concern about inroads on the principle that guilt must be established beyond a reasonable doubt. This was in 1958, twelve years prior to *Winship*. *See also* Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955) (especially comments at 109, 111-12). Thus, not expressly stating that extreme emotional disturbance is an affirmative defense *is* stating that the persuasion burden does not shift.

define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser degree," *People v. Patterson, supra* at 305, A. 114-115. This argument has been characterized as "the greater includes the lesser" rule. *See* Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases; A Theoretical Overview 79 Yale L.J. 165, 177-178 (1969). In essence, the argument is that since a state can punish intentional killing as murder without including any mitigation defense (i.e. the greater), if the state allows a mitigation defense it can shift the burden of persuasion to the defendant on this added beneficial factor (i.e. the lesser).

This argument as stated in *Ferry v. Ramsey*, 277 U.S. 88 (1927), a civil case, has, however, been rejected in criminal cases by this Court in *Tot v. United States*, 319 U.S. 463, 472 n.14 (1973) and *Leary v. United States*, 395 U.S. ~~32-34, 56, 59~~ 6, 32, n.56 33, 34, nn.59-61 n.~~10, 60-61~~ (1969); *see also Romano v. United States*, 382 U.S. 136, 144 (1965); McCormick, Evidence (2d ed. 1972) 812-813 n.21, 818 n.20; Ashford and Risinger, *supra* at 178 n.21; Comment, Unburdening the Criminal Defendant: *Mullaney v. Wilbur*, and the Reasonable Doubt Standard, 11 Harv. C.R.-C.L.L. Rev. 390, 398-400 (1976). In any event this Court in *Mullaney*, without specific reference to the above line of cases, also implicitly rejected this argument in crimes of murder and manslaughter, 421 U.S. at 697-698.

In sum, Appellant contends, assuming *arguendo*, that New York could eliminate its mitigation defense to murder, the answer is it has not chosen to do so. *Tot v. United States, supra; Leary v. United States, supra.* Moreover the possibility of legislative redefinition of crimes to take the issue of mitigation from the jury does not provide a reason for distinguishing the New York rule from the rule declared unconstitutional by this Court in *Mullaney*.

C. THE EROSION OF MULLANEY

Finally, if this Court seeks to distinguish between the closely related "heat of passion" and "extreme emotional disturbance" defenses it will erode the efficacy of *Winship* and *Mullaney*. Once constitutionally relevant distinctions are made between defenses which have a functional, historical and analytical identity, every State with a slightly different interpretation of such words as "passion", "provocation", "hot blood", "cooling off", "distress", "disturbance", "sudden", etc. will have a justification to avoid applying *Mullaney*.[22] *See* LaFave and Austin, Handbook on Criminal Law, 572-582 (1972). The *Patterson* majority stated that with the extreme emotional disturbance defense the "opportunity for mitigation differs significantly from the traditional heat of passion defense. 39 N.Y.2d at 302, A. 111. There was no articulation, however, of why being more liberal or fair or logical translates into any reason for shifting the burden. It is submitted there are no valid reasons for shifting the burden to the defendant where the defense is extreme emotional disturbance instead of its common law antecedent heat of passion. See Appendix B to this Brief.

D. SHIFTING THE BURDEN OF PERSUASION MADE A DIFFERENCE IN THIS CASE.

The love triangle situation is one of the classic contexts for considering the provocation issue. 40 Am. Jur. 2d *Homicide* §65 (1968). The *Patterson* fact pattern clearly fits this situation and there is no question that the defense of extreme emotional disturbance was squarely presented to the jury. *People v. Patterson, supra* at 304, A. 113. Moreover, as the trial judge

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[22] If self-defense or justification is held to be within the ambit of *Winship* and *Mullaney* the same problem will occur because some state definitions of justification are "broader" and more liberal than others. *See State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *cert. granted* U.S. , 45 U.S.L.W. 3292 (1976).

indicated in his charge to the jury, the basic facts were not subject to dispute (A. 73). Most importantly, the psychiatrist hired by the prosecution, who did not testify, agreed with the conclusions of the defense psychiatrist who did testify on the extreme emotional disturbance issue (A. 62; R. 1128), and the jury was instructed that they could "strongly infer" that he would have agreed with the defense psychiatrist (A. 62).

Shifting the burden of proof in this case also stands out in bold relief because this was a close case about which the jury had considerable doubts.[23] This is attested to by the facts that: (1) the deliberations took roughly fifteen hours over a period of two days (A. 82, 85, 86, 87); and (2) the jury made four requests for clarification of the charge. These requests were for a reading of the portion of the charge pertaining to the definitions of the two crimes charged — Murder and Manslaughter, in the First Degree (A. 83, 84); a second reading of those same portions of the charge (A. 92); a copy of the defendant's psychiatrist's report (A. 83); and a copy of defendant's testimony (A. 86-88).

As Mr. Justice Brennan wrote for the Court in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958):

> "there is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

The margin of error in this case was unconstitutionally enlarged, to Appellant's detriment, and, therefore, this conviction must be reversed.

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[23] *See* Shapiro, Affirmative Defenses After *Mullaney v. Wilbur:* New York's Extreme Emotional Disturbance, 43 Brook. L. Rev. 171 (1976).

POINT II

THE INSANITY DEFENSE IS CLEARLY DISTINGUISHABLE FROM THE EXTREME EMOTIONAL DISTURBANCE DEFENSE.

The Appellee has cited cases upholding the requirement that the defendant bear the burden of proving insanity in support of the proposition that *Patterson* is consistent with other jurisdictions in applying *Mullaney* (Point A (5) of Appellee's Motion). The implication of Appellee's reliance upon insanity cases is that placing the burden of proving insanity upon the defendant is constitutional.[24] Appellant submits that the defense of emotional disturbance cannot be equated with the insanity defense.

1. *The Defenses are Separate and Distinct in the New York Statutes.*

The *Patterson* majority did not base any part of their decision on a claim that extreme emotional disturbance should be treated constitutionally in the same manner as the insanity defense. Extreme emotional disturbance and insanity are two legally distinct defenses in New York; and, most significantly, New York does not shift the persuasion burden on insanity as it does with extreme emotional disturbance. N.Y. Penal Law §30.05 (McKinney 1975); *Brotherton v. People*, 75 N.Y. 159 (1878);

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[24] *See Mullaney, supra*, 704-706 (Rehnquist, J. with Burger, C.J., concurring); *Leland v. Oregon*, 343 U.S. 790 (1952); *Rivera v. State*, 351 A.2d 561 (Del.), *appeal dismissed sub nom. Rivera v. Delaware*, U.S. , 45 U.S.L.W. 3279 (1976); *but see, Davis v. United States*, 160 U.S. 469 (1895); *Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976); *United States v. Eichberg*, 439 F.2d 620, 624 (D.C. Cir. 1971) (per curiam) (Bazelon, C.J. dissenting); *United States v. Rustin*, 533 F.2d 879, 890, n.33 (3rd Cir. 1976) (Adams, J., dissenting); *see also*, Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity To The Defendant In Murder Cases, 56 B.U.L. Rev. 499 (1976).

People v. Silver, 33 N.Y.2d 475, 310 N.E.2d 520, 345 N.Y.S.2d 915 (1974).

2. *The Defenses are Different in Concept and Legal Function.*

Other responses to an attempt to lump extreme emotional disturbance with insanity proceed along different analytic lines. One is that extreme emotional disturbance, like its forebear heat of passion, is the distinguishing element between two of the gravest common law crimes — murder and manslaughter. Thus, for burden of proof purposes, as a matter of substance, these defenses go necessarily to a mental element (albeit a negative one) of the crime of murder (when put in issue), regardless of what *formal* label (i.e. mitigation) a state may give it. *Mullaney v. Wilbur*, *supra* at 699. At least insofar as the concurring opinion in *Mullaney* is concerned, this analysis of the heat of passion defense distinguishes it from insanity because:

> ". . . legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Id.* at 706.[25]

Like the heat of passion defense, extreme emotional disturbance warrants the same analytic distinction from the insanity defense. The function of both the heat of passion and extreme emotional disturbance defenses is identical — both defenses warrant *reducing* murder to manslaughter because of a less culpable form of intent. Insanity, on the other hand,

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[25]See Note, *supra*, 56 B.U.L. Rev. at 499 *et seq.*, where it is pointed out that because of the diversity of state-by-state interpretations of insanity the proposition quoted above, may be applicable only to those state rules where *in fact* there is no necessary relationship to the required mental element. In any event, where proof of a fact distinguishes manslaughter from murder, this fact necessarily goes directly to the required mental element of murder; otherwise there is no reason for the distinction. Therefore, it is the very concept of heat of passion and extreme emotional disturbance, not a state-by-state analysis that is determinative.

exonerates a defendant from criminal liability entirely. A defendant convicted of a reduced crime of manslaughter is not exonerated, but rather he may be given a lesser penal sanction than would have been imposed for a conviction for murder. When insanity is proved, the defendant does not receive a penal sanction because incarceration will have no deterrent or rehabilitative effect on a person who is insane. The criminal process in such a case fulfills no purpose. *See* Chernoff and Schaeffer, Defending the Mentally Ill: Ethical Quicksand, 10 Am Crim. L. Rev. 505, 506 (1972); Wechsler, *supra*.

The difference in the focus of the inquiry between insanity and heat of passion/extreme emotional disturbance is critical. With heat of passion/extreme emotional disturbance, the inquiry centers on establishing the "required mental element"[26] for the crime of murder or manslaughter; with insanity, the inquiry is directed to the defendant's mental status for the purpose of determining whether or not *any* penal sanction is appropriate. *See* Comment, Unburdening the Criminal Defendant; *Mullaney v. Wilbur* and the Reasonable Doubt Standard, 11 Harv. C.R.-C.L.L. Rev. 390, 405 n. 65 (1976); Hart, Punishment and Responsibility, 188-209 (1968).

3. *There is a Qualitative Difference in the Hardship of Disproving Each Defense.*

There is another analysis of the insanity defense which arguably affects the extreme emotional disturbance defense as distinguished from the heat of passion defense. Proponents of the "hardship of proof" argument note that since insanity is a much more subjective defense requiring proof concerning the defendant's state of mind and behavior, it is fair to place the

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[26]See *People v. Patterson*, *supra* at 304, A.113, where the majority stated: ". . . the defendant had not established that his intent was formulated under the influence of an extreme mental trauma."

burden on the party asserting it. *See Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976).[27] Appellant's general response to the hardship of proof argument is set footh in Point I.B (2-a).

Specifically with reference to a comparison to insanity, defendant contends that extreme emotional disturbance like heat of passion is ultimately based on an objective standard while insanity is subjective. *Mullaney v. Wilbur*, *supra* at 702.

The issue with insanity is whether or not the defendant himself is insane, without regard to any external triggering mechanism or provocation. The reasons why a defendant is insane are not, *per se*, relevant. The focus is thus of necessity internal and subjective. Extreme emotional disturbance, on the other hand, refers not only to the reasons *why* the defendant lost control, but also asks whether there is "*reasonable* explanation or excuse" for the defendant's conduct. It is true that "the reasonableness . . . is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be," and this introduces some subjectivity,[28] but in the words of those responsible for the formulation of the extreme emotional disturbance defense, the "ultimate test" is objective. Model Penal Code §201.3 Comment (Tent. Draft No. 9 1959) (at 41, 46-48); (Appendix B-1 — B-3 of this Brief).

The *Patterson* case is a good example of the ultimate objective standard applied to an extreme emotional disturbance defense. The definition of the defense provided to the jury by the court

[27]Since New York places the ultimate burden of persuasion for insanity on the prosecution, it is difficult to see how this argument carries weight insofar as New York is concerned.

[28]As defendant has already pointed out even Maine has described heat of passion as basically subjective, but made objective because the ultimate test is the adequacy of the provocation. *State v. Rollins*, *supra*, 919, 920. Under former law, New York has described "heat of passion" as "primarily being a state of mind." *People v. Peetz*, 7 N.Y.2d 147, 151, 164 N.E.2d 384, 196 N.Y.S.2d 83 (1959).

was starkly simple — "self evident in meaning" *People v. Patterson*, *supra* at 293, (A.99). The Court instructed the jury that the basic facts upon which they were to make their determination of the affirmative defense were not in dispute (A.73). These facts and events included the stormy marital relationship, the discovery by appellant of his wife's illicit affair with the victim, the exchange of Christmas presents, the fateful sermon two days later, and finally the discovery by Appellant later that evening of his wife half undressed in the presence of her lover are all relevant and essentially objective circumstances.

The psychiatric testimony in *Patterson* was laced with reference to facts and events which were the subject of proof at trial (A.3-37).[29] This is to be compared with the conclusions of psychiatrists in cases of insanity such as "psychopathic personality", "psychopathic trait disturbance" and "schizophrenic paranoid". *People v. DiPiazza*, 24 N.Y.2d 342, 349-50, 248 N.E.2d 412, 300 N.Y.S. 2d 545, 551 (1969); *People v. Lee*, 29 App. Div. 2d 837, 277 N.Y.S. 2d 607, 608 (4th Dep't 1968).

Thus, as a matter of proof, extreme emotional disturbance is clearly more within the ambit of the heat of passion defense (*Mullaney v. Wilbur*, *supra* at 702) than the subjective behavioral criteria applicable to a determination of insanity.[30]

[29]The mere fact that psychiatric testimony was presented can be of no particular significance since psychiatrists are also used in "heat of passion" cases. *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286, 287 n.1 (1972).

[30]Extreme emotional disturbance has no psychiatric diagnostic classification. *People v. Shelton*, Misc.2d , 385 N.Y.S.2d 708, 715-716 (Sup. Ct. N.Y. Co. 1976).

> "In order to arrive at a definition of 'extreme emotional disturbance' to apply to defendant's actions in this case, I asked both forensic psychiatrists to state their understanding of the term. (Both are very experienced witnesses who have given expert testimony in hundreds of cases.)
>
> "They agreed that this term is a creature of law and has no diagnostic classification in the Diagnostic and Statistical Manual of the American Psychiatric Association."

4. *State Practices Do Not Support Shifting The Burden On Extreme Emotional Disturbance.*

A fourth response to the attempt to lump extreme emotional disturbance with insanity is that the inquiry into state practices so important to sustaining the shift in burden on insanity in *Leland* (*Leland v. Oregon*, *supra* at 798) cuts the opposite way with the defense of extreme emotional disturbance. Appendix A to this Brief shows that most states adopting the ALI Model Penal Code defense place the burden on the prosecution. Moreover, since the Model Penal Code defense is firmly grounded in the common law heat of passion defense, the state practice on this defense is also relevant and the clear trend is "toward requiring the prosecution to bear the ultimate burden of proving this fact." *Mullaney v. Wilbur*, *supra* at 696.

5. *New York Has Eschewed A Presumption Analysis Of Extreme Emotional Disturbance.*

Finally, it should be noted that the burden of proof issue on the insanity defense is bound up with the presumption[31] of "all English-speaking courts" that all men are sane. *Leland v. Oregon*, *supra* at 799. In this regard it is important to note that New York has eschewed a presumption analysis with regard to extreme emotional disturbance. *People v. Patterson*, *supra* at 299, (A.107).[32] Nor did *Mullaney* proceed on a presumption analysis. *Mullaney v. Wilbur*, *supra*, at 702 n. 31. In fact, it is difficult to perceive how a killing in the "love triangle" context could be presumed not to be in the heat of passion when the context is the most common one for asserting the heat of passion

[31] In fact this was referred to as a "doctrine" in *Leland*. *Leland v. Oregon*, *supra* at 796.

[32] *Compare People v. Felder*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643 (1973), *aff'g.* 39 App. Div. 2d 373, 339 N.Y.S.2d 992 (2d Dep't 1972), *appeal dismissed sub nom. Felder v. New York*, 414 U.S. 948 (1973). This decision was based on a presumption analysis.

type of defense. 40 Am. Jur. 2d *Homicide* §65 (1968). *See also*, Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955). Further a presumption analysis cannot justify shifting the persuasion burden to the defendant. In the terms used by Ashford and Risinger, *supra*, such a shift would be denominated an "assumption" (*i.e.* a presumption that in fact does more than require a defendant to show "some evidence" to rebut the presumption).[33] This clearly is in conflict with the persuasion burden required by *Mullaney*. *Mullaney v. Wilbur*, *supra* at 702-703 and n.31; *see also Lavine v. Milne*, U.S. , 96 S.Ct. 1010, 1016 n.10 (1976).

Thus, no factor which supports shifting the burden of persuasion for the insanity defense supports a similar shift for the extreme emotional disturbance defense.

[33] See Note, Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant, 64 Geo. L.J. 871, 883 (1976); *see also, United States v. Hendrix*, F.2d , N.Y.L.J. at 1, col. 6 (10/25/76) (2d Cir. 1976) where the court stated:

"We have, in matters involving other presumptions, consistently held that a true presumption is a procedural device, not evidence; and that, when proof in rebuttal is introduced, the presumption is out of the case. (citations omitted)

> "This is the so-called "Thayer" Rule which has been adopted by the American Law Institute in its Model Code of Evidence, Rule 704(2), and is favored by most authorities in the field of evidence. *See* 9 Wigmore, Evidence, Section 2491 at 289 (1940); H. Weihofen, Insanity as a Defense in Criminal Law, 162 (1933); Richardson on Evidence, Section 63 (10th ed. 1973); Reaugh, Presumptions and the Burden of Proof, 36 Ill. L. Rev. 703, 833 (1942); *but cf.* McCormick, Evidence, Section 316 at 665 et seq. (1954)." *United States v. Hendrix*, *supra*, at p. 17, col. 3.

POINT III

RETROACTIVITY IS NOT A BAR TO CONSIDERATION OF THE PATTERSON CASE WHICH REACHES THIS COURT ON DIRECT APPEAL.

The New York Court of Appeals, in order to reach the constitutional issue in *Patterson*, explicitly held that *Mullaney* should be given retroactive effect. *People v. Patterson*, *supra* at 296, (A.103). The charge to the jury was given in *Patterson* on June 7, 1971, *Id.* at 294, (A.100), but the case was decided on direct appeal and comes before this Court on direct appeal. The dispositive argument favoring complete retroactivity[34] is that *Mullaney* was based on *Winship* which was held by this Court to have complete retroactive effect in *Ivan v. City of New York*, 407 U.S. 203 (1972). *Mullaney v. Wilbur*, *supra* at 296, (A.103).

Yet even without this fairly clear indication in *Mullaney* itself, the issue presented by this appeal passes the test set forth for determining retroactivity. This test has been stated in various ways, but devolves to this threshold question: Does the new ruling to be applied affect the very integrity of the fact finding process? *Linkletter v. Walker*, 381 U.S. 618 (1965); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *Williams v. United States*, 401 U.S. 646, 653 (1971), the test was stated as follows:

> "... Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance

[34] Since this matter comes to this Court on direct appeal Appellant need not prevail on complete retroactivity. *See*, *Linkletter v. Walker*, 381 U.S. 618 (1965).

> by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." (footnote omitted).

Since the *Mullaney* ruling deals with the application of the reasonable doubt standard which forms the framework for determining guilt or innocence for specific crimes, it should by this standard be given retroactive effect.

CONCLUSION

In conclusion, defendant contends that *Winship* and *Mullaney* control this appeal. The New York affirmative defense of extreme emotional disturbance is functionally identical to the Maine heat of passion defense declared unconstitutional because of the shifting of the burden in *Mullaney*. Substance should control form and thus Maine's use of the phrase "malice aforethought", found by this Court to be a policy presumption only and not a fact to be proved, should have no weight in distinguishing the New York defense. The more liberal wording of the New York defense similarly provides no reason for allowing the burden to be shifted to defendant, particularly since the defense is based on the ALI Model Penal Code defense which does not shift the burden. Further, the *Winship* analysis by this Court in *Mullaney* applies with equal analytic force to the extreme emotional disturbance defense. Finally, if a qualitative distinction between these functionally identical defenses is found which justifies not applying *Mullaney*, then *Mullaney* itself will be eroded because of the variety of practices among the states in defining and applying the heat of passion defense.

For the reasons stated in this brief, it is respectfully submitted that the decision of the New York Court of Appeals should be reversed and a new trial should be ordered.

Dated: December, 1976

Respectfully submitted,

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(affidavit of service omitted in printing)

APPENDICES

APPENDIX A

STATE PRACTICES ON PLACING THE BURDEN OF PERSUASION ON THE EXTREME EMOTIONAL DISTURBANCE DEFENSE

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Arkansas	State	Ark. Stat. Ann. §41-1502 (Supp. 1976)	Ark. Stat. Ann. §§41-110, 41-115 (Supp. 1976)
Conn.	~~State~~ Defendent	Conn. Gen. Stat. §53a-54a (1975)	*State v. Anonymous (1976-5)*, 33 Conn. Supp. 28. 359 A.2d 715 (Superior Ct. 1976), holds murder statute unconstitutional insofar as it required defendant to prove extreme emotional disturbance by preponderance of the evidence.
Delaware	State	Del. Code 11 §636 (Supp. 1975)	*Fuentes v. State*, 349 A.2d 1 (1976) (holds Del. Code 11 §641 (1975) unconstitutional because statute required that defendant prove mitigating circumstances of "extreme emotional distress" by preponderance of evidence.)

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Hawaii	State	1972 Haw. Sess. Laws 37 §§701, 702 (1973)	1972 Haw. Sess. Laws 37 §115 (1973). Section 702 terms extreme mental or emotional defense a "defense." Section 115 only requires that defendant raise a reasonable doubt in order to succeed on a particular defense.
Kentucky	State	Ky. Rev. Stat. Ann. §507.020 (Supp. 1976)	Ky. Rev. Stat. Ann. §500.75 (1975) merely places the burden of going forward on a defendant who asserts the defense of extreme emotional disturbance.
Maine	State	Me. Rev. Stat. 17-A §204 (Supp. 1976)	Predecessor of present section 204 required defendant to prove extreme emotional disturbance by a preponderance of the evidence. Me. Rev. Stat. 17-A §204 (Supp. 1975). In 1975 the Maine Legislature repealed that language.

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Montana	State	Mont. Rev. Codes Ann. §§94-5-102, 94-5-103 (Supp. 1973)	It is settled law in Montana that a defendant need only raise a reasonable doubt when asserting a defense affirmative or otherwise. *See State v. Grady*, 166 Mont. 168, 531 P.2d 681 (1975).
New Hampshire	State	N.H. Rev. Stat. Ann. §§630:1a, 630:1b, 630:2 (1974)	N.H. Rev. Stat. Ann. §626:7 (1974) places the burden of persuasion on the defendant only when a defense is explicitly labelled an "affirmative" defense. "Extreme mental or emotional disturbance" N.H. Rev. Stat. Ann. §630:2 (1974) is not labelled as an "affirmative defense."
North Dakota	State	N.D. Cent. Code §12.1-16-02 (1976)	N.D. Cent. Code §12.1-01-03 (1976) requires that a defendant merely raise a reasonable doubt on any issue which is not explicitly labelled an "affirmative defense" by statute. "Extreme emotional disturbance" is not so labelled.

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Ohio	State	Ohio Rev. Code Ann. §§2903.01-2903.03 (Page 1975)	Ohio Rev. Code Ann. §2901-05 (Page 1975).
Oregon	State	Or. Rev. Stat. §§ 163.005, 163.115, 163.125 (1975)	*State v. Siens*, 12 Or. App. 97, 504 P.2d 1056 (1973), *construing* Or. Rev. Stat. §161.055 (1973) (Defendant merely has duty of going forward with extreme-emotional-distress defense).
Utah	State	Utah Code Ann. §§76-5-201 to 76-5-205 (Supp. 1975)	Utah Code Ann. §77-31-12 (1953) states that the defendant has burden of proving mitigating circumstances, but case law has consistently interpreted the statutory language as meaning that defendant merely has burden of going forward. *State v. Harris*, 58 Utah 331, 199 P. 415 (1921); *State v. Dewey*, 41 Utah 538, 127 P. 275 (1912).

APPENDIX B

The History of the Extreme Emotional Disturbance Defense

Taken from Model Penal Code §201.3, Comments (Tent. Draft No. 9 1959) at 41, 46, 48:

Finally, the class of cases which would otherwise be murder but may be reduced to manslaughter under the present law because the homicidal act occurred "in heat of passion" upon "adequate provocation" is substantially enlarged by paragraph (1)(b). The draft reframes entirely the decisive question, asking whether the homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse" and adding that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."

We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. We also introduce a larger element of subjectivity in the appraisal, though it is only the actor's "situation" and "the circumstances as he believes them to be", not his scheme of moral values, that are thus to be considered. The ultimate test, however, is objective: there must be "reasonable" explanation or excuse for the actor's disturbance. This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so grave a crime as homicide. The major difficulty with the criterion of premeditation and deliberation as a decisive test, is, indeed, that taken seriously it would rest decision on the fact of the disturbance, without attention to its cause; that probably is

why it is so generally nullified in practice. (Citations omitted) Comments, *supra* at 41.

* * *

5. *Mental or Emotional Disturbance.* Paragraph (1)(b) widens, as we have said, the class of homicides which may be reduced from murder to manslaughter under existing law because they are committed when the actor suffers from extreme emotional disturbance, the "heat of passion" of the common law.

In the first place, the draft does not confine the mitigation to cases of provocation in the ordinary meaning of the term, i.e., an injury, injustice or affront perpetrated by the deceased on the actor. While the traditional concept has been extended by some courts to cases where the actor was mistaken in believing that his victim was responsible for the provocative injury or even that the injury occurred, the extension hardly can go far enough to comprehend the actor provoked by A who strikes at B in blind distress. There may be difficulty also with the case where the actor is distressed by witnessing or learning of an injury to someone else or even by erroneous belief in its occurrence. Such excluded cases may, however, be among the strongest for the mitigation, since both the cause and the intensity of the actor's emotion may be relatively less indicative of depravity of character than a homicidal response to a blow. By referring to "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" rather than to provocation, the draft avoids a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation when the homicidal actor was in great distress.

Secondly, the formulation sweeps away the rigid rules that have developed with respect to the sufficiency of particular types

of provocation, such as the rule that words alone can never be enough. Given evidence of extreme mental or emotional disturbance, the question whether it is based on "reasonable explanation or excuse" may be confronted, as we think it should be, in the light of all the circumstances in the case.

Thirdly, and most importantly, the formulation seeks to qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of provocation by its effect on the reasonable man. To require, as the rule is sometimes stated, that the provocation be enough to make a reasonable man do as the defendant did is patently absurd; the reasonable man quite plainly does not kill. But even the correct and the more common statement of the rule, that the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor. Not only is the actor's temperament deemed immaterial or the fact that he was drunk but, as the House of Lords has recently declared, "infirmity of body or affliction of the mind" are both irrelevant. The same position holds respecting "cooling time", which also must be judged by the time required for relief from tension by the hypothetical reasonable man.

Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character

that it is fair to draw upon the basis of his act. So too in such a situation as *Gounagias, supra*, where lapse of time increased rather than diminished the extent of the outrage perpetrated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.

> "We submit that the information in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a 'reasonable explanation or excuse' for the extreme disturbance of the actor; and that the reasonableness of any explanation or excuse 'shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.' There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." (Footnotes and citations omitted.) Comments, *supra*, at 46-48.

The Revised New York Penal Law of 1967 which adopted the ALI Model Penal Code defense of "extreme emotional disturbance" was the product of the State Commission on Revision of the Penal Law and Criminal Code. The Staff Notes of this Commission describe the defense as follows:

"Subdivision 2 also presents an offense grounded in the common law but new to New York. The common law enunciates the seemingly sound doctrine, known as voluntary manslaughter and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed 'heat of passion,' 'sudden passion,' 'provocation' and the like. New York and a few other jurisdictions having similar statutory patterns evidently were vaguely aware of this doctrine but confused and destroyed it in the creation of their manslaughter provisions, all of which apply only where there is no 'design to effect death' (existing P.L. §§1050, 1052). While, therefore, the Penal Law contains two manslaughter provisions speaking of a killing 'in the heat of passion' [existing §§1050(2), 1052(2)], neither is applicable to intentional killings, the very basis of the whole doctrine. Instead of enunciating the traditional principle that murder by intentional killing is mitigated and reduced to manslaughter by 'heat of passion,' these provisions define a narrow and rather meaningless offense which is committed by a fatal assault without homicidal intent and 'in the heat of passion.' Thus, 'heat of passion' is erroneously predicated not as a mitigating factor reducing a homicide from murder to manslaughter but as an affirmative element of the specified form of manslaughter.

"The proposed provision eliminates this hybrid offense and replaces it with the traditional crime embracing the principle of mitigation. In the process, the phrase, 'in the heat of passion,' is abandoned as the criterion of mitigation in favor of the phrase, 'under the influence of extreme emotional disturbance for which

there is a reasonable explanation or excuse.' This standard, adopted from the equivalent manslaughter provision of the Model Penal Code [§210.3(b)], is, in the Commission's opinion, superior to 'heat of passion' and other traditional criteria from the standpoint of both logic and general fairness (see Model Penal Code Commentary, Tentative Draft No. 9, pp. 28-29)." Gilbert's Criminal Law and Practice of New York (1967), pp. 1C-61 - 1C-62.

The Practice Commentaries to New York Penal Law §125.20 (Hechtman, Practice Commentaries to N.Y. Penal Law §125.20 (McKinneys 1975) State *inter alia* at 391, 393:

"The common law enunciates the seemingly sound doctrine, known as 'voluntary manslaughter' and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed 'heat of passion,' 'sudden passion,' 'provocation,' and the like (1 Warren on Homicide [Perm. Ed.] § 85, pp. 416-417). The theory of the principle is one of extending a degree of mercy to a defendant who, though intending to kill, acted out of some kind of emotional disturbance rather than in cold blood."

* * *

"Subdivision 2, in conjunction with a provision of the revised murder statute (§ 125.25[1a]), restores to New York the aforementioned common law doctrine of reduction from murder to manslaughter on the basis of 'heat of passion.' In the restoration process, however, the phrase 'in the heat of passion' is abandoned as the

criterion of mitigation in favor of the phrase, 'under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse' (§ 125.25[1a]). The latter standard is adopted from the Model Penal Code of the American Law Institute (§ 210.3[b]), and the reasons prompting this change are fully expounded in the Institute's commentaries (Model Penal Code Commentary, Tent. Draft No. 9, pp. 28-29)."